

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BETTY GUZMAN, individually and
on behalf of all other similarly
situated,

Plaintiff,

v.

BRIDGEPOINT EDUCATION, INC.,
et al.,

Defendants.

Case No. 11-cv-69-BAS(WVG)

ORDER:

**(1) GRANTING DEFENDANTS'
MOTION FOR SANCTIONS; AND**

**(2) DENYING PLAINTIFF'S
MOTION FOR CLASS
CERTIFICATION**

[ECF Nos. 86, 78]

On January 11, 2011, Plaintiff Betty Guzman commenced this class action against Defendants Bridgepoint Education, Inc. ("Bridgepoint"), Ashford University ("Ashford"), and University of the Rockies ("The Rockies"),¹ alleging that Defendants "engaged in a pattern of improper and unlawful conduct in order to recruit students and over-charge the federal government for federal financial aid . . . through the use of standardized, misleading recruitment tactics[.]" (Compl. ¶ 6.) Plaintiff amended the

¹ University of the Rockies is no longer a party to this action. It was dismissed by court order on May 30, 2012.

1 complaint twice, the current operative complaint being the Second Amended Complaint
 2 (“SAC”). Now pending before the Court are Defendants’ motion for sanctions and
 3 Plaintiff’s motion for class certification. Both motions are opposed.

4 Having reviewed the papers submitted and oral argument from both parties, the
 5 Court **GRANTS** Defendants’ motion for sanctions (ECF No. 86) and **DENIES**
 6 Plaintiff’s motion for class certification (ECF No. 78).

7 8 **I. BACKGROUND²**

9 Bridgepoint is “one of the largest publicly-traded for-profit college companies
 10 in the United States” with more than 5,800 employees. (SAC ¶¶ 22, 25.) Ashford is
 11 an academic entity founded, owned, and operated by Bridgepoint. (SAC ¶¶ 23–25.)
 12 It “offer[s] Associate’s, Bachelor’s, Master’s, and Doctoral degree programs, primarily
 13 online.” (SAC ¶ 25.) Though most of Ashford’s students are enrolled in the online
 14 program, it nonetheless maintains a physical campus in Clinton, Iowa. (SAC ¶ 23.)
 15 Students take only one online class at a time, each course typically being five weeks
 16 in length. (Ng Dep. 221:12–23.)

17 According to the complaint, 67,744 students have enrolled in Bridgepoint’s
 18 institutions, “99% of whom were attending classes exclusively online.” (SAC ¶ 26.)
 19 The total student enrollment at Ashford and The Rockies increased from 19,509
 20 students at the end of the first quarter in 2008 to 42,025 students as of March 31, 2009.
 21 (SAC ¶ 27.) New student enrollment for the first quarter of 2009 was approximately
 22 16,800 compared to new enrollments of approximately 8,800 for the first quarter of
 23 2008. (*Id.*) As of December 31, 2012, over 50,300 students have graduated from the
 24 Bridgepoint institutions with students having enrolled from all 50 states, the District
 25 of Columbia, and 60 different countries. (Bridgepoint 10-K (2012) at 5.)

26 //

27
 28 ² The following background is based primarily on the SAC and the exhibits attached to
 Plaintiff’s class-certification motion. The parties are to presume that exhibits referenced in this section
 are to those attached to the class-certification briefs, unless noted otherwise.

1 At the heart of this action is Plaintiff's assertion that "Bridgepoint's explosive
2 enrollment growth at its online academic institutions is a direct result of misleading
3 marketing tactics designed to recruit students to attend its schools, and its
4 implementation of federally-prohibited employee incentive programs that were
5 designed to encourage 'enrollment advisors' to recruit as many students as possible."
6 (SAC ¶ 28.)

7 8 **A. Advertising and Marketing**

9 Prior to 2012, Ashford's only national marketing was through third-party
10 "aggregator websites," which are "websites that allow students interested in
11 information regarding post-secondary education to input their information to be sent
12 to a number of universities," including Ashford. (Mignone Decl. ¶ 4; Mignone Dep.
13 118:10–23.) Currently, however, marketing efforts include digital, print, and television
14 advertising. (Mignone Dep. 109:7–111:12.) Digital advertising composed of "70 to
15 80 percent" of all advertising with the remaining "20 to 30 percent" consisting of print
16 and television advertising. (*Id.*) Ashford does not use the same messaging across all
17 advertising forms. (*Id.* at 139:8–19.)

18 Ashford's main website is www.ashford.com. A communications review
19 committee—consisting of "compliance, legal, and other individuals that are part of
20 Ashford University"—vets all content posted on the website. (Mignone Dep.
21 51:3–16.) "The marketing content on the current website is . . . different from what
22 was on the website in 2005 because Ashford University has expanded its programs and
23 regularly changes its marketing message." (Mignone Decl. ¶ 5.)

24 In addition to the main website, Ashford has also used other website addresses,
25 the quantity depending on considerations such as the current "campaign" and site
26 testing. (Mignone Dep. 113:7–23.) Currently, Ashford has three additional websites.
27 (*Id.* at 113:16–114:25.) One of these websites is degrees.ashford.edu, which is a
28 "landing environment for paid search." (*Id.*) In other words, it is a site where

1 prospective students “simply submit information if they would like to request more
2 information.” (*Id.*) The other two websites are here.ashford.edu and
3 belong.ashford.edu, which are also landing environments associated with current or
4 former advertising campaigns. (*Id.*) Students cannot enroll at these landing
5 environments. (*Id.*)

6 Ashford also sends representatives to military bases and military conferences to
7 recruit potential students. (Mignone Dep. 142:22–144:12.) It sends representatives to
8 community colleges and conferences to recruit and speak about corporate partnerships,
9 among other things, as well. (*Id.* at 144:13–25.) Furthermore, “[o]ftentimes, people
10 may refer friends or family members or people that they work with to attend Ashford
11 University, and that’s an important group of inquiries[.]” (*Id.* at 103:14–24; *see also*
12 Grady Decl. ¶ 10.)

13 14 **B. Enrollment Advisors**

15 After Ashford received contact information from aggregator websites, it would
16 have its enrollment advisors follow up. (Mignone Dep. 120:1–9.) Enrollment advisors
17 “provid[e] whatever is necessary to what the student is asking[.]” (Ng Dep. 66:12–19.)
18 Questions typically received from prospective students range “from the specific
19 education they are looking for all the way to normal questions that students ask when
20 they are looking for what is the right college for them[.]” including questions related
21 to costs and programs. (*Id.* at 67:6–21.)

22 Enrollment advisors are trained to give “accurate and truthful information” to
23 prospective students. (Ng Dep. 54:8–55:24.) As a part of this training, advisors are
24 given written materials including “the content piece for student services” and
25 “conversation guides.” (*Id.*) The purpose of the written materials is so that a newly
26 hired enrollment advisor can first learn “what the content is” and then have
27 “conversation guides to ensure that they are giving students . . . information that’s
28 pertinent to that specific student.” (*Id.*) Though all newly hired enrollment advisors

1 receive training materials, different training materials are given depending on the
2 relevant department. (*Id.*) Defendants insist that enrollment advisors are not given
3 scripts. (*Id.*)

4 One document provided in the training materials is titled “Ethics of Admissions,
5 which provides nine ethical guidelines for enrollment advisors, including “[a]here[nce]
6 to state and federal Do Not Call regulations,” and “[m]aintaining truth and accuracy of
7 all areas of advertisement.” (Young Decl. Ex. 16; *see also* Young Decl. Ex. 17
8 (document titled “Enrollment Compliance Acknowledgment”).) Elaborating on the
9 latter, the guidelines explicitly state that “[i]t is unacceptable to misrepresent or advise
10 students incorrectly in any area, (i.e. length of time for completion, program content,
11 attendance requirements, certification, technology requirement, PLA, all charges
12 associated with degree program)” and that “[i]t is not permissible to discuss a definitive
13 amount of funds a student may receive in student loans/grants, a definitive amount of
14 transfer credits prior to an unofficial pre-evaluation or employability upon
15 graduation[.]” (Young Decl. Ex. 16.)

16 In a document titled “Incorporating Quality Control,” presumably from the
17 training materials, Ashford instructed enrollment advisors that “ALL outbound calls
18 must include this verbiage”: “Great! This call may be monitored for quality assurance.
19 So tell me, [prospective student’s name], why is getting your degree so important to
20 you (Motivation Question)?” (Bottini Decl. Ex. 22.) That document makes clear that
21 “[the verbiage] must happen immediately in the call and within a very short time
22 period. No later than 60 seconds.” (*Id.*) The purpose of the verbiage is to prevent the
23 conversation from “get[ting] away from us[.]” which is why enrollment advisors should
24 not ask “How are you, today?” in their introductions. (*Id.*) Enrollment advisors are
25 further instructed that their first role is to increase enrollment and achieving that goal
26 may be done if they “Create Urgency” in a “polite, helpful way!” (Bottini Decl. Ex.
27 11.)

28 //

1 Ashford also provided guides to its enrollment advisors addressing follow-ups
2 and leaving effective messages. (Bottini Decl. Ex. 12.) In these guides, fields are left
3 open for enrollment advisors to presumably fill out to develop a consistent approach
4 in their own words. (*Id.*) For example, in the document titled “Leaving Effective
5 Messages - The Rules,” enrollment advisors are told to “[w]rite down 6 [reasons to call
6 you back] and circle 2-3 you might use” to complete the sentence “When you call me
7 back, we will discuss” (*Id.*) Example language is also provided throughout this
8 document along with occasional instructions to the enrollment advisor. (*Id.*) Some
9 instructions provided state, for example: “Be Persistent!”; “It’s important to mix things
10 up a little with your message to avoid sounding like a broken record”; “Spend your
11 time wisely and focus on meeting the students [sic] needs”; and “Slow down and listen
12 to your students.” (*Id.*) Other documents are similar in form including instructions
13 given with example language. (*See, e.g.*, Bottini Decl. Ex. 23.)

14 Despite the instructions in these guides, a former enrollment advisor at Ashford
15 from August 2009 to January 2011—Ryan Ferguson—states in a declaration that
16 “Ashford pressured enrollment advisors to employ a series of tactics, including making
17 misrepresentations and concealing material information, to induce students to begin
18 enrollment and to remain enrolled.” (Ferguson Decl. ¶ 7.) He continues, “Although
19 Bridgepoint’s training materials required ‘truth and accuracy in all areas of
20 advisement,’ enrollment advisors were pressured to say anything necessary to enroll
21 students.” (*Id.*) To achieve enrollment goals, enrollment advisors purportedly used
22 “uniform scripted oral misrepresentations[.]” (*Id.* ¶ 9.) However, the declaration only
23 provides generalized contents of the purported “uniform scripts,” such as “describ[ing]
24 Bridgepoint schools as great school with amazing professors who offer individualized
25 attention to students” and “claiming that a degree from Bridgepoint schools would
26 provide students and prospective students a competitive advantage over graduates from
27 other postsecondary schools.” (*See id.*)

28 //

1 **C. Student Complaints**

2 Plaintiff is “one of the tens of thousands of students who [allegedly] fell victim
3 to Bridgepoint’s systematic false advertisements, material omissions, dissemination of
4 misstatements, and boiler-room pressure recruiting tactics.” (SAC ¶ 30.) Her initial
5 contact with Bridgepoint started through the Internet, and in the time period leading up
6 to enrollment at Ashford in 2006, “a Bridgepoint enrollment advisor used high-pressure
7 sales tactics on her by calling her several times a week.” (*Id.*) According to Plaintiff,
8 the enrollment advisor made numerous misrepresentations, including:

- 9 • “Bridgepoint schools offered the most affordable education to students,
10 and the tuition and costs were the ‘lowest’ and could not be found
11 elsewhere”;
- 12 • “Federal financial aid would cover all tuition, books, fees, and other costs,
13 including costs for purchasing computers and software”;
- 14 • “The need to enroll as soon as possible and to apply for maximum
15 financial aid was urgent”;
- 16 • “Bridgepoint schools are fully accredited, and all credits awarded by
17 Bridgepoint schools are transferable to other higher education
18 institutions”; and
- 19 • “A high percentage of Bridgepoint graduates found jobs in their fields of
20 studies immediately following graduation, and earned tens of thousands
21 of dollars in annual income.”

22 (*Id.*) Plaintiff alleges that all of these statements are lies. (SAC ¶ 31.) And though
23 inaccurate, “these statements are part of the uniform script designed by Bridgepoint,
24 and used by all Bridgepoint enrollment advisors during their communications with
25 prospective students.” (*Id.*)

26 //

27 //

28 //

1 Other students had similar experiences. For example, one student, a veteran, was
 2 repeatedly told by recruiters that his post-9/11 GI Bill benefits would cover the entire
 3 cost of his degree, only to find out after he was enrolled that he would owe
 4 approximately \$11,000 to Ashford that his benefits did not cover. (Bottini Decl. Ex.
 5 3.³) According to that student, he “was extremely disappointed, confused and angry[,]”
 6 and felt that he “ha[d] been misled, deceived or even outright lied to in an effort to gain
 7 [his] contractual agreement.” (Bottini Decl. Ex. 3, Document 1.) That said, the student
 8 did note that except for incident involving tuition, he “thoroughly enjoyed [his]
 9 affiliation with Ashford University and [has] effectively referred several people to this
 10 University” because he “completely believe[s] in the concepts that Ashford subscribes
 11 to and [has] been a strong advocate of this University.” (*Id.*)

12 In another example, a student was told that he would be able to receive his
 13 teaching license from Ashford. (Bottini Decl. Ex. 3, Document 2.) But a year later,
 14 right before his scheduled graduation, he found out that Ashford was not allowed by
 15 the state of Iowa to award teaching licenses, so he would have to attend a “cooperating
 16 school” in Arizona for a year. (*Id.*) The student “was really blown away to find out
 17 that [he] had spent so much time and money at a College that [he] was not going to be
 18 able to obtain [his] Teacher’s license from.” (*Id.*)

19 Another student entered Ashford intending to become a licensed dental assistant.
 20 (Bottini Decl. Ex. 3, Document 3.) Recruiters told him that he could achieve this goal
 21 at Ashford. (*Id.*) After becoming suspicious about the lack of dental classes one year
 22 in, he raised his suspicion with his academic advisor who told him Ashford would not
 23 lead to a dental assistant license and that “she didn’t really have anything to say.” (*Id.*)
 24 The student told the school that he felt that he was “completely and utterly lied to,”

25
 26 ³ Exhibit 3 to the Bottini Declaration includes a summary of the U.S. Senate Committee on
 27 Health, Education, Labor, and Pensions (“Senate HELP Committee”)’s of many of the student
 28 complaints it received as a part of its investigation in addition to copies of over 20 different actual
 student complaints. This document is a part of a collection of documents produced by the Senate
 HELP Committee’s investigation “focusing on the Federal investment in for-profit higher education
 companies and whether the \$26 billion in annual taxpayer money flowing to this sector is a good value
 for students and taxpayers.” (Bottini Decl. Ex. 1; *see also* Bottini Decl. Exs. 2, 3, 5.)

1 only to be left with \$9,000 in loans and \$3,000 owed to the school. (*Id.*)

2 In addition to experiences where students felt lied to by recruiters, student
3 complaints included a broad range grievances: (1) students who could not get a
4 response to their requests for help once enrolled; (2) students who found out after
5 leaving or graduating that they owed money; (3) mishandling of student financial aid;
6 (4) students who were not informed of a technology fee; (5) lack of accommodation for
7 students who need extra help; (6) problems with transfer credits; (7) students who felt
8 worse off after attending Ashford; and (8) complaints directed at specific teaching
9 programs, such as the use of an outdated curriculum. (Bottini Decl. Ex. 3.) Plaintiff
10 supports her motion with student complaints that touch upon each and every one of the
11 general categories listed above.⁴

12 13 **D. Procedural History**⁵

14 There are two related actions filed in this district: (1) *Rosendahl v. Bridgepoint*
15 *Education, Inc.*, No. 11-cv-61-BAS(WVG) (S.D. Cal. Jan 11, 2011); and (2) *Ferguson*
16 *v. Bridgepoint Education, Inc.*, No. 11-cv-493-BTM(DHB) (S.D. Cal. Mar. 10, 2011).⁶
17 Both actions name the same defendants—Bridgepoint, Ashford, and The Rockies—and
18 the same plaintiffs’ counsel—Francis A. Bottini—as this action.

19 *Rosendahl* was strikingly similar to this action, alleging similar facts and
20 asserting nearly identical claims, including claims for violations of the California
21 Business & Professions Code §§ 17200 and 17500, violation of the California
22 Consumer Legal Remedies Act (“CLRA”), and negligent misrepresentation. The

23
24 ⁴ Defendants contend that the Senate HELP Committee’s documents are inadmissible and
25 irrelevant. (Defs.’ Opp’n 24:11–25:22.) Despite this objection, the Court will nonetheless consider
the Senate HELP Committee documents.

26 ⁵ On May 15, 2014, this action was transferred to this Court. Prior to that date, the Honorable
27 William Q. Hayes presided over this action. All orders issued prior to May 15, 2014 were issued by
Judge Hayes.

28 ⁶ One of the named plaintiffs in *Ferguson* is Ryan Ferguson, whose declaration is included in
support of Plaintiff’s class-certification motion.

1 plaintiffs in *Rosendahl* also proposed a near-verbatim class definition as the one
 2 proposed in this action, down to the proposed class period, with the only difference
 3 being the inclusion of University of the Rockies⁷:

4 All persons in the United States, who during the period from
 5 approximately March 1, 2005 through the present . . . ,
 6 enrolled in and/or attended classes offered by Bridgepoint
 7 Education through either of its two academic institutions,
 8 Ashford University or University of the Rockies. Excluded
 9 from the Class are defendants, their immediate families,
 10 subsidiaries, affiliates, successors-in-interest,
 11 representatives, trustees, executors, administrators, heirs,
 12 assigns or transferees, any person acting on behalf of
 13 defendants, all governmental entities, and co-conspirators.

14 Ultimately, on February 28, 2012, the *Rosendahl* action was administratively closed
 15 after the court granted the defendants' motion to compel arbitration.

16 *Ferguson* was a *qui tam* action brought under the False Claims Act, based on
 17 allegations that prospective students were induced to enroll at Bridgepoint schools by
 18 making misrepresentations and concealing material information. The United States
 19 chose to decline to intervene, and on June 13, 2013, the case was eventually dismissed
 20 without prejudice at the joint request of the parties.

21 This action commenced on January 12, 2011, around the same time as *Rosendahl*
 22 and *Ferguson*. Plaintiff amended the complaint twice, the current operative complaint
 23 being the SAC. Plaintiff asserts five claims under California law in her SAC: (1)
 24 Violation of Business & Professions Code § 17200 (Unfair Trade Practices Act, also
 25 known as Unfair Competition Law or "UCL"); (2) Violation of Business & Professions
 26 Code § 17500 (False Advertising Act or "FAL"); (3) Violation of the CLRA; (4)
 27 Violation of Civil Code § 1710(3); and (5) Negligent Misrepresentation.

28 Now pending before the Court are Defendants' motion for sanctions and
 Plaintiff's motion for class certification. Both motions are opposed. The Court will
 address both motions below in turn, beginning with Defendants' motion for sanctions,

⁷ The proposed class definition from *Rosendahl* can be found in paragraph 34 of that action's complaint.

1 which presents a preliminary issue that needs to be resolved before reaching Plaintiff's
2 motion for class certification.

3 4 **II. DEFENDANTS' MOTION FOR SANCTIONS⁸**

5 On May 9, 2013, Plaintiff served Defendants initial disclosures pursuant to
6 Federal Rule of Civil Procedure 26(a)(1). (Bottini Decl. ¶ 10; Young Decl. ¶ 2; Pl.'s
7 Initial Disclosures 2:19–23.) Subsequently, on June 7, 2013, Plaintiff served
8 Defendants her First Amended Initial Disclosures. (Bottini Decl. ¶ 10; Pl.'s First Am.
9 Initial Disclosures 185:1–186:19.) In both disclosures, Plaintiff did not list Ryan
10 Ferguson as a potential witness in this litigation. (Bottini Decl. ¶ 10; Young Decl. ¶
11 2; Pl.'s Initial Disclosures 2:24–3:9; Pl.'s First Am. Initial Disclosures 185:1–186:19.)

12 As previously mentioned, Mr. Ferguson is a former employee of Defendants who
13 had filed a *qui tam* action against them in March 2011. *See Ferguson*, No. 11-cv-493.
14 Plaintiff's current counsel, Mr. Bottini, along with two other attorneys represented Mr.
15 Ferguson and his co-plaintiff in the *qui tam* action. Similar to Plaintiff's SAC and Mr.
16 Ferguson's declaration in support of Plaintiff's class-certification motion, Mr.
17 Ferguson alleged Defendants incentivized their employees to use uniform written and
18 scripted oral misrepresentations in an effort to meet enrollment quotas. The matter was
19 dismissed on June 13, 2013. (*See* Bottini Decl. ¶ 3.)

20 On August 6, 2013, Defendants served Plaintiff with interrogatories. (Young
21 Decl. ¶ 3; Defs.' Interrog. 7:15–12:25.) The interrogatories sought facts, documents,
22 and witnesses supporting specific allegations in Plaintiff's SAC. (*See* Defs.' Interrog.
23 7:15–12:25.) Defendants' sixteenth interrogatory, particularly relevant here, requested
24

25
26 ⁸ All references to documents and exhibits—in particular, the declarations of counsel—in this
27 section are to the attachments to the parties' briefing addressing Defendants' motion for sanctions.
28 It is important to note this footnote to avoid confusion with documents and exhibits related to the
class-certification motion. Furthermore, in abbreviating to citations to the briefs of the two pending
motions, "Mot.," "Opp'n," and "Reply" refer to the class-certification briefs, and "Sanctions Mot.,"
"Sanctions Opp'n," and "Sanctions Reply" refer to the sanctions briefs.

1 Plaintiff to “[s]tate all facts that support [her] allegation in paragraph 52 of the SAC
 2 that [Defendants] ‘make uniform written and scripted oral misrepresentations’ . . .
 3 including but not limited to . . . any [persons] who provided these statements.” (Defs.’
 4 Interrog. 10:17–23.) Plaintiff served responses to Defendants’ interrogatories on
 5 October 9, 2013. (Bottini Decl. ¶ 12; Pl.’s Resp. Defs.’ Interrog. 27:1–28:22.) But she
 6 again failed to identify Mr. Ferguson, or any other witness, as requested by Defendants’
 7 sixteenth interrogatory. Plaintiff merely objected to the interrogatory while also
 8 directing Defendants’ attention to the allegations set forth in her SAC. (Young Decl.
 9 ¶ 4; Pl.’s Resp. Defs.’ Interrog. 27:1–28:22.)

10 On November 22, 2013, the parties’ counsel met and conferred regarding
 11 Plaintiff’s responses to Defendants’ interrogatories. (Young Decl. ¶ 5.) Plaintiff’s
 12 counsel “confirmed that Plaintiff possessed no additional information responsive to
 13 Defendants’ interrogatories,” “was not withholding any responsive information as
 14 privileged or protected[,]” and “did not intend to further supplement her interrogatory
 15 responses and would not use any previously undisclosed witnesses to support her
 16 claims.” (Young Decl. ¶ 6.) On January 9, 2014, Defendants’ counsel sent a letter to
 17 Plaintiff’s counsel confirming these representations and stating they would “move to
 18 exclude any . . . witnesses that [P]laintiff ha[d] not disclosed in her responses . . .
 19 should [P]laintiff attempt to later provide, produce or disclose such . . . witnesses in
 20 support of the various specific contentions[.]” (Defs.’ Sanctions Mot. Ex. 4.)

21 On March 31, 2014, the period allotted for class-certification-related discovery
 22 closed.⁹ (Case Mgmt. Conference Order 2:17–19.) And then, on April 30, 2014,
 23 Plaintiff filed her now-pending motion for class certification. She also submitted a
 24 declaration from Mr. Ferguson in support of the class-certification motion. (ECF No.
 25 78-19.) Plaintiff’s motion for class certification relies heavily on Mr. Ferguson’s

27 ⁹ Discovery in this litigation was bifurcated; the first phase limited to solely discovery of
 28 class-certification-related evidence occurred from September 23, 2013 until March 31, 2014. (See
 ECF No. 61.)

1 declaration to substantiate her contention that her proposed class satisfies Rule 23(a)'s
2 commonality requirements. (*See* Pl.'s Mot. 27:7–28.)

3 One week after filing her class-certification motion, Plaintiff served Defendants
4 her Second Amended Initial Disclosures. (Young Decl. ¶ 8; Pl.'s Second Am. Initial
5 Disclosures 2:21–26.) In these disclosures, Plaintiff listed Mr. Ferguson as a possible
6 witness “likely to have discoverable information” regarding “Defendants’ policies and
7 practices . . . relating to recruiting prospective students . . . and keeping students in
8 enrollment.” (Pl.'s Second Am. Initial Disclosures 3:23–4:1.)

9 On June 9, 2014, Defendants filed a motion for Rule 37 sanctions concerning
10 Plaintiff's failure to disclose Mr. Ferguson as witness in her initial discovery
11 disclosures and failure to amend her initial disclosures in response to Defendants'
12 interrogatories. Plaintiff opposes Defendants' sanctions motion.

13 14 **A. Rule 26's Disclosure Requirement**

15 Federal Rule of Civil Procedure 26(a) states “a party must, without awaiting a
16 discovery request, provide to the other parties . . . the name and, if known, the address
17 and telephone number of each individual likely to have discoverable
18 information—along with the subjects of that information—that the disclosing party
19 may use to support its claims or defenses, unless the use would be solely for
20 impeachment[.]” Fed. R. Civ. P. 26(a)(1)(A)(i). Additionally, Rule 26(e) requires “[a]
21 party who has made a disclosure under Rule 26(a)—or who has responded to an
22 interrogatory, request for production, or request for admission—[to] supplement or
23 correct its disclosure or response . . . in a timely manner if the party learns that in some
24 material respect the disclosure or response is incomplete or incorrect, and if the
25 additional or corrective information has not otherwise been made known to the other
26 parties during the discovery process or in writing[.]” Fed. R. Civ. P. 26(e)(1)(A).

27 //

28 //

Where “a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” Fed. R. Civ. P. 37(c)(1). “In addition to or instead of this sanction, the court on motion and after being given an opportunity to be heard” may instead “order payment of the reasonable expenses, including attorney’s fees, caused by the failure[,] may inform the jury of the party’s failure[,] or may impose other appropriate sanctions[.]” Fed. R. Civ. P. 37(c)(1)(A)–(C). The Ninth Circuit “give[s] particularly wide latitude to the district court’s discretion to issue sanctions under Rule 37(c)(1).” *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). This is because “[p]arties, aware of the ‘self-executing’ and ‘automatic’ nature of Rule 37(c)(1) sanctions, have a right to expect that only disclosed witnesses will be used to support the disclosing party’s claims and defenses.” *Rhodes v. Sutter Health*, 949 F. Supp. 2d 997, 1010 (E.D. Cal. 2013) (quoting *Yeti*, 259 F.3d at 1106); *see also* Fed. R. Civ. P. 37 advisory committee’s note (1993) (“This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence.”).

B. Violation of Rule 26’s Disclosure Requirement

Defendants argue Plaintiff violated Rule 26(a) by failing to disclose Mr. Ferguson in her initial disclosures and in her responses to Defendants’ interrogatories. (Defs.’ Sanctions Mot. 8:5–8.) Conversely, Plaintiff contends she has not violated Rule 26’s disclosure requirements because she “did not intend to use Ferguson as a witness until late April 2014,” past the point at which she had filed her SAC and served Defendants responses to their interrogatories, and because Mr. Ferguson is not the source of the allegations contained in her SAC. (Pl.’s Sanctions Opp’n 14:11–18.) As a result, Plaintiff argues she was not required to disclose Mr. Ferguson as a witness in her initial disclosures or subsequent interrogatory responses to Defendants. (*Id.* at

1 13:15–16.)

2 The suspicious circumstances surrounding Mr. Ferguson strongly suggest
 3 Plaintiff violated Rule 26’s disclosure requirements. Plaintiff’s counsel—Mr.
 4 Bottini—previously represented Mr. Ferguson in an action against Defendants which
 5 featured allegations closely matching those Plaintiff asserts in her SAC. As such,
 6 Plaintiff cannot claim she was unaware of Mr. Ferguson’s identity prior to responding
 7 to Defendants’ interrogatories or serving her Second Amended Initial Disclosures. It
 8 is irrelevant whether Plaintiff herself, rather than her counsel, knew Mr. Ferguson had
 9 discoverable information that could substantiate her allegations in the SAC at the time
 10 she served Defendants her responses to their interrogatories because “[a] party cannot
 11 refuse to answer interrogatories on the ground that the information sought is solely
 12 within the knowledge of his attorney.” *See Hickman v. Taylor*, 329 U.S. 495, 504
 13 (1947). Hence, given Plaintiff’s counsel’s knowledge of Mr. Ferguson’s previous
 14 litigation against Defendants and the similarity of Mr. Ferguson’s complaint to
 15 Plaintiff’s SAC, Mr. Ferguson was an “individual likely to have discoverable
 16 information” that Plaintiff might have “used to support [her] claims.” *See Fed. R. Civ.*
 17 *P. 26(a)(1)(A)(i).*

18 Additionally, Plaintiff’s reliance on the 2006 Advisory Committee’s notes’
 19 reference to “intent” to demonstrate that she complied with Rule 26’s requirements is
 20 misplaced. (*See Pl.’s Sanctions Opp’n* 12: 7–13, 16:9–12.) Requiring parties to
 21 disclose only those witnesses they subjectively intend to use in substantiating their
 22 claims, rather than those they merely “may use” as Rule 26 explicitly requires, would
 23 erode the efficacy of the rule’s disclosure requirements. *See Fed. R. Civ. P. 26(a).*
 24 Parties would be free to engage in the sort of “gamesmanship” Rule 26 intends to
 25 prevent by hiding witnesses and evidence that they have to offer from their opposition.
 26 *See Fed. R. Civ. P. 26 advisory committee’s note* (1993). Such is not the spirit of Rule
 27 26. *See Thomas v. Old Town Dental Grp., P.A.*, 300 F.R.D. 585, 589 (S.D. Fla. 2014)
 28 (noting that a party’s contention it need not disclose fact witnesses in response to an

1 interrogatory calling for fact witnesses unless the party “chose to rely” on the witnesses
2 was meritless because such an intent-based disclosure requirement “would permit
3 litigants to easily hide unfavorable witnesses with impunity”). Consequently, Plaintiff
4 was required to disclose Mr. Ferguson regardless of whether she subjectively intended
5 to use him as a witness prior to late April 2014.

6 Furthermore, Plaintiff’s argument concerning her lack of intent to use Mr.
7 Ferguson as a witness prior to serving Defendants her Second Amended Initial
8 Disclosures is dubious. Thus far, Mr. Ferguson’s declaration is the primary evidence
9 Plaintiff offers to substantiate her claims that Defendants use “uniform scripted oral
10 misrepresentations” in conducting their business. (Pl.’s Mot. 16:3 (quoting Ferguson
11 Decl. ¶ 9); *see also* SAC ¶¶ 52, 55.) Under Federal Rule of Civil Procedure 11, in
12 presenting a pleading to a federal court, an attorney “certifies that to the best of the
13 person’s knowledge, information, and belief, formed after an inquiry reasonable under
14 the circumstances . . . the factual contentions have evidentiary support or, if specifically
15 so identified, will likely have evidentiary support after a reasonable opportunity for
16 further investigation or discovery[.]” Fed. R. Civ. P. 11. Therefore, assuming Plaintiff
17 was complying with Rule 11 when filing her SAC, and keeping in mind both the fact
18 that Mr. Ferguson is one of the few, if not the only, witness Plaintiff offers in support
19 of the allegations highlighted above and Plaintiff’s counsel’s knowledge of Mr.
20 Ferguson’s previous complaint against Defendants, it is highly unlikely Plaintiff would
21 not have intended to use Mr. Ferguson to support her claims at the times she filed her
22 SAC or later when served her responses to Defendants’ interrogatories.

23 Accordingly, Plaintiff’s failure to identify Mr. Ferguson in her initial disclosures
24 and in response to Defendants’ interrogatories violated Rule 26’s disclosure
25 requirements.

26 //

27 //

28 //

C. Substantial Justification or Harmlessness

Defendants contend Plaintiff's non-disclosure was neither substantially justified nor harmless because the sudden introduction of Mr. Ferguson's declaration surprised Defendants in a manner that cannot be cured, brought in evidence quintessential to Plaintiff's SAC and motion for class certification, and cannot be founded on any reasonable explanation by Plaintiff. (*See* Defs.' Sanctions Mot. 8:1–18.) In response, Plaintiff argues she was substantially justified in not disclosing Mr. Ferguson's identity because "it cannot be disputed that [she] ha[d] no obligation to identify Ferguson as a witness." (*See* Pl.'s Sanctions Opp'n 21:6–7 (emphasis in original).) Additionally, Plaintiff avers her non-disclosure was harmless because Defendants have known of "[Mr. Ferguson's] allegations of their illegal practices since December 2012" and did not delineate "what possible remedial measures are appropriate" or how they were harmed by Plaintiff's non-disclosure. (*Id.* at 21:6–7, 21:14–15, 21:22–23, 22:24.)

Rule 37's exclusionary sanction may be avoided and "information may be introduced if the [non-disclosing] parties' failure to disclose the required information [wa]s substantially justified or harmless." *Yeti*, 259 F.3d at 1106 (quoting Fed. R. Civ. P. 37(c)(1)). "The party facing sanctions bears the burden of proving that its failure to disclose the required information was substantially justified or is harmless." *R & R Sails, Inc. v. Ins. Co. of Penn.*, 673 F.3d 1240, 1246 (9th Cir. 2012).

Plaintiff fails to meet her burden of demonstrating that her failure to disclose Mr. Ferguson was either substantially justified or harmless. As the Court explained above, Plaintiff is wrong in contending that she had no obligation whatsoever to disclose Mr. Ferguson's identity to Defendants. Therefore, she was not substantially justified for her non-disclosure on the basis of having had no obligation to do so.

Additionally, Plaintiff's citation to *Krzesniak v. Cendant Corp.*, No. C 05-05156 MEJ, 2007 WL 1795703, *1 (N.D. Cal. June 20, 2007), in supporting her argument that her non-disclosure was substantially justified is misplaced. (*See* Pl.'s Sanctions Opp'n 21:10–12.) There, the plaintiff was substantially justified in failing to initially disclose

1 a witness it later relied on where the plaintiff was unable to locate the witness because
2 the defendant—who was the employer of the witness—had opposed the plaintiff’s
3 previous request for the witness’ contact information. *See Krzesniak*, 2007 WL
4 1795703, at *5.

5 Here, Defendants in no way hid Mr. Ferguson’s identity from Plaintiff at any
6 point during this litigation. Indeed, it is quite apparent it is Plaintiff who hid Mr.
7 Ferguson’s identity from Defendants until the deadline for class-certification discovery
8 passed. Therefore, Plaintiff fails to meet her burden of demonstrating that she was
9 substantially justified in failing to disclose Mr. Ferguson’s identity to Defendants
10 pursuant to Rule 26 on this ground as well.

11 Similarly, Plaintiff fails to demonstrate her failure to disclose Mr. Ferguson’s
12 identity was harmless. Contrary to Plaintiff’s contentions, any failure on the part of
13 Defendants to delineate how Plaintiff’s non-disclosure was harmful does not carry her
14 burden of demonstrating her non-disclosure was harmless. *See R & R Sails*, 673 F.3d
15 at 1246 (“The party facing sanctions bears the burden of proving that its failure to
16 disclose the required information was substantially justified or is harmless.”).
17 Plaintiff’s only argument supporting her non-disclosure was harmless is that
18 Defendants had knowledge of Mr. Ferguson’s prior complaint against them, meaning
19 they could not have been surprised by his introduction. (*See Pl.’s Sanctions Opp’n*
20 21:6–7, 21:14–15, 21:22–23, 22:24.) However, this argument is without merit.

21 It is where a witness has been alluded to in the same litigation, not different
22 litigation, that a party’s failure to disclose a witness has been considered harmless. *See*
23 *Van Maanen v. Youth With a Mission-Bishop*, 852 F. Supp. 2d 1232, 1237 (E.D. Cal.
24 2012), *aff’d sub nom. Van Maanen v. Univ. of the Nations, Inc.*, 542 F. App’x 581 (9th
25 Cir. 2013) (finding a failure to disclose a witness harmless where the identity, location
26 and subject of information possessed by a witness was revealed during numerous
27 depositions in the same case months before the discovery cut-off date). Here, however,
28 there is no indication Mr. Ferguson was alluded to in any depositions taken or any

1 other proceedings in this litigation. Rather, after responding to Defendants'
2 interrogatories, Plaintiff's counsel assured Defendants they were not withholding any
3 witnesses not already disclosed. (Young Decl. ¶ 6.)

4 Courts have even found the non-disclosure of a witness harmful where the
5 witness was referenced in the same litigation. *See Rhodes*, 949 F. Supp. 2d at 1010
6 (finding a plaintiff's non-disclosure of a witness was not harmless where, although the
7 witness had been referenced in depositions, the defendant "was not on sufficient notice
8 that [the witness] possessed information that supported plaintiff's claims or defenses
9 such that [the defendant] could make an informed decision about whether to pursue
10 discovery as to [the witness]"). Like the defendant in *Rhodes*, Defendants here lacked
11 any notice Plaintiff would be using Mr. Ferguson as a witness in light of Plaintiff's
12 failure to initially disclose his identity, subsequent failure to disclose his identity in
13 response to Defendants' interrogatories, and further confirmation they were not
14 withholding any additional witnesses. Following that chain of events, Plaintiff cannot
15 now claim Defendants' knowledge of Mr. Ferguson's prior litigation against them
16 rendered her failure to disclose Mr. Ferguson's identity prior to her Second Amended
17 Initial Disclosures harmless.

18 Because Plaintiff violated Rule 26 and fails to demonstrate that this violation
19 was substantially justified or harmless, Defendants are entitled to sanctions under Rule
20 37.

21 **D. Appropriate Sanction**

22 Defendants argue the exclusion of Mr. Ferguson's declaration is the only
23 appropriate sanction because lesser remedies would be insufficient to correct the
24 prejudice Plaintiff's non-disclosure cost them and because further discovery and
25 litigation of the class certification would entail substantial cost. (*See* Defs.' Sanctions
26 Mot. 10:11–11:6.) In response, Plaintiff contends no sanctions are appropriate here
27 because she "has complied with her disclosure obligations" and Defendants have
28

1 consequently “suffered no harm[.]” (Pl.’s Sanctions Opp’n 8:2–3, 8:16.) Plaintiff
 2 asserts that, at most, Defendants should be allowed to depose Mr. Ferguson. (*See id.*
 3 at 8:18–20.)

4 Because Defendants’ motion for sanctions may materially affect the course of
 5 litigation, the Court must consider sanctions aside from the complete exclusion of Mr.
 6 Ferguson’s declaration. By excluding Mr. Ferguson’s declaration, Defendants’ motion
 7 here may undermine the merits of Plaintiff’s motion for class certification.¹⁰ Thus, in
 8 adjudicating Defendants’ motion for Rule 37 sanctions, the Court is “required to
 9 consider whether the claimed noncompliance involved willfulness, fault, or bad faith
 10 . . . and also consider the availability of lesser sanctions.” *R & R Sails*, 673 F.3d at
 11 1247 (internal citation omitted).

12 Here, Plaintiff is incorrect in her contention that no sanctions, or alternatively,
 13 allowing Defendants to depose Mr. Ferguson, would be proper. Rather, exclusion of
 14 and striking any references to Mr. Ferguson’s declaration in Plaintiff’s motion for class
 15 certification and SAC is proper. Plaintiff is correct in noting the Court could re-open
 16 class-certification discovery and allow Defendants to depose Mr. Ferguson rather than
 17 exclude Mr. Ferguson’s declaration and impose monetary sanctions against Plaintiff.
 18 (*See* Pl.’s Sanctions Opp’n 24:17–18.) However, despite this possibility, Rule 37’s
 19 default remedy of exclusion is appropriate under these circumstances. *See* Fed. R. Civ.
 20 P. 37 advisory committee’s note (1993) (noting Rule 37 “provides a self-executing
 21 sanction” which “prevents a party from using as evidence any witness or information
 22 that . . . has not been disclosed as required by Rules 26(a) and 26(e)(1)”).

23 As discussed above, Plaintiff’s violation of Rule 26 is without substantial
 24

25 ¹⁰ Plaintiff’s motion for class certification relies heavily on Mr. Ferguson’s declaration to
 26 substantiate the contention that her proposed class satisfies Rule 23(a)’s commonality requirement.
 27 (*See* Pl.’s Mot. 27:7–28.); *see also* 28 U.S.C. § 636(b)(1)(A) (noting district court judges may not
 28 designate magistrate judges to hear and determine motions to “dismiss or permit maintenance of a
 class action”); *Maisonville v. F2 America, Inc.*, 902 F.2d 746, 747 (9th Cir.1989) (agreeing with other
 appellate courts that it is motions for discovery sanctions under Rule 37 not contained within 28
 U.S.C. § 636(b)(1)’s list that are non-dispositive matters).

1 justification or harmlessness. Plaintiff was well aware of Mr. Ferguson as an
2 individual likely to have discoverable information supporting her claims, and she had
3 a duty to disclose Mr. Ferguson's identity to Defendants under Rule 26. Simply
4 re-opening class-certification discovery and allowing Defendants to depose Mr.
5 Ferguson would strip Rule 26 and Rule 37 of their efficacy. Rule 37's exclusionary
6 sanction exists with the purpose of deterring litigants from "hiding the ball" as Plaintiff
7 has done here. *See Rhodes*, 949 F. Supp. 2d at 1010 (quoting *Yeti*, 259 F.3d at 1106)
8 ("Parties, aware of the 'self-executing' and 'automatic' nature of Rule 37(c)(1)
9 sanctions, have a right to expect that only disclosed witnesses will be used to support
10 the disclosing party's claims and defenses.").

11 Plaintiff's failure to disclose Mr. Ferguson's identity before the close of
12 discovery for class certification prejudiced Defendants by, at the very least, preventing
13 them from deposing him as a witness during the regular course of litigation. Had
14 Plaintiff properly disclosed Mr. Ferguson's identity as a witness prior to serving
15 Defendants her Second Amended Initial Disclosures, Defendants could have deposed
16 Mr. Ferguson as a witness during discovery and fully litigated against Plaintiff's
17 motion for class certification. It would be unreasonable to burden Defendants with the
18 costs of deposing Mr. Ferguson and amending their opposition to Plaintiff's motion for
19 class certification at this time. Plaintiff directly induced Defendants into believing they
20 had no further need to undertake discovery relating to class certification in this
21 litigation.

22 Therefore, because Plaintiff's non-disclosure violates Rule 26 and is not
23 substantially justified or harmless, exclusion of Mr. Ferguson's declaration is
24 appropriate. *See Ollier v. Sweetwater Union High Sch. Dist.*, 267 F.R.D. 339, 343–44
25 (S.D. Cal. 2010) (Lorenz, J.) (excluding fact witnesses where, although the witnesses
26 had been at least mentioned during various depositions, discovery had closed and
27 non-disclosure was harmful and without substantial justification). *Cf. R & R Sails*, 673
28 F.3d at 1246 (holding a district court's exclusion of evidence pursuant to Rule 37 was

1 improper because the court failed to consider whether the non-disclosure involved
 2 willfulness, fault, or bad faith, or if lesser sanctions were a viable option).

4 **III. PLAINTIFF’S MOTION FOR CLASS CERTIFICATION**

5 The class action is “an exception to the usual rule that litigation is conducted by
 6 and on behalf of the individual named parties only.” *Wal-Mart Stores, Inc. v. Dukes*,
 7 131 S.Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01
 8 (1979)). In order to justify a departure from that rule, “a class representative must be
 9 part of the class and ‘possess the same interest and suffer the same injury’ as the class
 10 members.” *Id.* (citing *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403
 11 (1977)). In this regard, Rule 23 contains two sets of class-certification requirements
 12 set forth in Rule 23(a) and (b). *United Steel, Paper & Forestry, Rubber, Mfg. Energy,*
 13 *Allied Indus. & Serv. Workers Int’l Union v. ConocoPhillips Co.*, 593 F.3d 802, 806
 14 (9th Cir. 2010). “A court may certify a class if a plaintiff demonstrates that all of the
 15 prerequisites of Rule 23(a) have been met, and that at least one of the requirements of
 16 Rule 23(b) have been met.” *Otsuka v. Polo Ralph Lauren Corp.*, 251 F.R.D. 439, 443
 17 (N.D. Cal. 2008).

18 “Rule 23(a) provides four prerequisites that must be satisfied for class
 19 certification: (1) the class must be so numerous that joinder of all members is
 20 impracticable; (2) questions of law or fact exist that are common to the class; (3) the
 21 claims or defenses of the representative parties are typical of the claims or defenses of
 22 the class; and (4) the representative parties will fairly and adequately protect the
 23 interests of the class.” *Otsuka*, 251 F.R.D. at 443 (citing Fed. R. Civ. P. 23(a)). “A
 24 plaintiff must also establish that one or more of the grounds for maintaining the suit are
 25 met under Rule 23(b), including: (1) that there is a risk of substantial prejudice from
 26 separate actions; (2) that declaratory or injunctive relief benefitting the class as a whole
 27 would be appropriate; or (3) that common questions of law or fact predominate and the
 28 class action is superior to other available methods of adjudication.” *Id.* (citing Fed. R.

1 Civ. P. 23(b)).

2 Plaintiff proposes the following class definition:

3 All person in the United States who enrolled in and/or
 4 attended classes offered by Bridgepoint Education, Inc.
 through Ashford University during the period from
 5 approximately March 1, 2005 through the present (“Class
 Period”). Excluded from the class are defendants,
 6 defendants’ immediate families, subsidiaries, affiliates,
 successors-in-interest, representatives, trustees, executors,
 7 administrators, heirs, assigns or transferees, any person
 acting on behalf of defendants, all governmental entities, and
 8 coconspirators.

9 She contends that the class is ascertainable and satisfies all the requirements of Rule
 23(a), and seeks class certification under Rule 23(b)(3). Defendants, in response,
 10 argue: (1) students enrolled on or after May 18, 2007 should be excluded from the class
 11 because they are subject to an arbitration provision; (2) certification of a nationwide
 12 class under California law is improper; (3) the proposed class lacks commonality; and
 13 (4) class treatment is not proper because individual issues will predominate in
 14 determining liability.

15 Rule 23(b)(3) requires the court to find “that the questions of law or fact
 16 common to class members predominate over any questions affecting only individual
 17 members.” “The predominance inquiry focuses on ‘the relationship between the
 18 common and individual issues’ and ‘tests whether proposed classes are sufficiently
 19 cohesive to warrant adjudication by representation.’” *Vinole v. Countrywide Home*
 20 *Loans, Inc.*, 571 F.3d 935, 944 (9th Cir. 2009). “When common questions present a
 21 significant aspect of the case and they can be resolved for all members of the class in
 22 a single adjudication, there is clear justification for handling a dispute on a
 23 representative rather than on an individual basis.” *In re Infineon Tech. AG Sec. Litig.*,
 24 266 F.R.D. 386, 395 (N.D. Cal. 2009). In contrast, when “claims require a fact-
 25 intensive, individual analysis,” then class certification will “burden the court” and be
 26 inappropriate. *Vinole*, 571 F.3d at 947; *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d
 27 1180, 1189 (9th Cir. 2001) (“[I]f the main issues in a case require the separate
 28 adjudication of each class member’s individual claim or defense, a Rule 23(b)(3) action

1 would be inappropriate[.]”).

2 Rule 23(b)(3)’s predominance and superiority requirements
 3 were added to cover cases in which a class action would
 4 achieve economies of time, effort, and expense, and promote
 5 . . . uniformity of decision as to persons similarly situated,
 6 without sacrificing procedural fairness or bringing about
 7 other undesirable results. Accordingly, a central concern of
 8 the Rule 23(b)(3) predominance test is whether adjudication
 9 of common issues will help achieve judicial economy.
 10 *Vinole*, 571 F.3d at 944 (internal quotation marks and citations omitted).

11 Though there is substantial overlap between Rule 23(a)(2)’s commonality and
 12 Rule 23(b)’s predominance tests, the latter is a “far more demanding” standard. *Wolin*
 13 *v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1172 (9th Cir. 2010) (quoting
 14 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997)). To determine whether
 15 questions of law or fact common to the class predominate, the court must analyze each
 16 claim separately. *Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1068 (9th Cir.
 17 2014) (citing *Erica P. John Fund, Inc. v. Halliburton Co.*, — U.S. —, 131 S. Ct. 2179,
 18 2184 (2011)).

19 “Plaintiffs must also demonstrate that a class action is ‘superior to other
 20 available methods for fairly and efficiently adjudicating the controversy.’” *Otsuka*, 251
 21 F.R.D. at 448 (citing Fed. R. Civ. P. 23(b)(3)). “Where classwide litigation of common
 22 issues will reduce litigation costs and promote greater efficiency, a class action may be
 23 superior to other methods of litigation,” and it is superior “if no realistic alternative
 24 exists.” *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234-35 (9th Cir. 1996). The
 25 following factors are pertinent to this analysis:

- 26 (A) the class members’ interest in individually controlling
 27 the prosecution or defense of separate actions;
- 28 (B) the extent and nature of any litigation concerning the
 controversy already begun by or against class members;
- (C) the desirability or undesirability of concentrating the
 litigation of the claims in the particular forum; and
- (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

//

1 **A. Ascertainability**

2 “As a threshold matter, and apart from the explicit requirements of Rule 23(a),
3 the party seeking class certification must demonstrate that an identifiable and
4 ascertainable class exists.” *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009).
5 Certification is improper if there is “no definable class.” *See Lozano v. AT & T*
6 *Wireless Servs., Inc.*, 504 F.3d 718, 730 (9th Cir. 2007).

7 “A class should be precise, objective, and presently ascertainable,” though “the
8 class need not be so ascertainable that every potential member can be identified at the
9 commencement of the action.” *O’Connor v. Boeing N. Am. Inc.*, 184 F.R.D. 311, 319
10 (C.D. Cal. 1998) (internal quotation marks omitted). “A class is ascertainable if it is
11 defined by ‘objective criteria’ and if it is ‘administratively feasible’ to determine
12 whether a particular individual is a member of the class.” *Bruton v. Gerber Prods. Co.*,
13 No. 12-CV-02412-LHK, 2014 WL 2860995, at *4 (N.D. Cal. June 23, 2014).
14 However, “[a] class definition is inadequate if a court must make a determination of the
15 merits of the individual claims to determine whether a person is a member of the class.”
16 *Hanni v. Am. Airlines, Inc.*, No. C 08-00732, 2010 WL 289297, at *9 (N.D. Cal. Jan.
17 15, 2010). “It is not fatal for a class definition to require some inquiry into individual
18 records, as long as the inquiry is not so daunting as to make the class definition
19 insufficient.” *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 673 (N.D. Cal. 2011)
20 (internal quotation marks omitted).

21 The ascertainability issue presented to the Court is what effect arbitration
22 provisions included in student enrollment agreements beginning on May 18, 2007 have
23 on class treatment. Defendants argue that the fact that the Court has found that the
24 enrollment agreements are enforceable in *Rosendahl* coupled with evidence that over
25 96% of the proposed class would be subject to the arbitration provision should end the
26 class-certification inquiry. (Defs.’ Opp’n 12:27–14:16.) Plaintiff dismisses
27 Defendants’ argument contending Defendants are re-arguing already-rejected
28 arguments and that they fail to meet their burden to demonstrate any valid arbitration

1 agreements with potential absent class members. (Pl.’s Reply 1:19–4:5.)

2 On August 23, 2013, relying on *Herrera*, the Court concluded that “[a]lthough
3 discovery may reveal that some unnamed class members in this case signed an
4 enforceable arbitration agreement, [it] does not find that this fact demonstrates an
5 overbroad or unascertainable class that forecloses certification *at this stage of the*
6 *proceedings.*” (Aug. 23, 2013 Order 6:9–27 (emphasis added).) Though the Court was
7 presented with substantially similar arguments and evidence, the Court did not exclude
8 the possibility of revisiting the issue following discovery. Upon reviewing the
9 arguments presented and the circumstances of this case, revisiting the effect of the
10 arbitration provisions at this juncture of litigation is appropriate.

11 In *Herrera*, the district court stated:

12 The fact that *some* members of a putative class may have
13 signed arbitration agreements or released claims against a
14 defendant does not bar class certification. Other courts
15 presented with this issue have held that “class certification
should not be denied merely because some class members
may be subject to the defense that their claims are barred by
valid documents releasing the defendant from liability.”

16 *Herrera*, 274 F.R.D. at 681 (quoting *Coleman v. GMAC*, 220 F.R.D. 64, 91 (N.D.
17 Tenn. 2004)) (emphasis added). It is worth noting that the district court did not
18 identify, of the 4,746 potential class members, how many may be subject to an
19 arbitration provision. *See id.* Thus, the extent of “some” is unclear. *See id.* That said,
20 the district court in *Pablo v. Servicemaster Global Holdings Inc.*, No. C 08-03894 SI,
21 2011 WL 3476473, at *3 (N.D. Cal. Aug. 9, 2011), directly addressed *Herrera*’s
22 proposition and determined that class certification was not proper under the
23 circumstances presented in its case because, “[a]lthough it is not clear how many
24 putative class members signed arbitration agreements, the evidence . . . support[ed] an
25 inference that a significant number did.” The *Pablo* Court noted that defendants had
26 filed 37 motions to compel arbitration in eight related cases, all of which were granted.
27 *Pablo*, 2011 WL 3476473, at *1.

28 //

1 The circumstances presented here are not as overwhelming or compelling as the
 2 circumstances described in *Pablo*. There has only been one related
 3 case—*Rosendahl*—in which a motion to compel arbitration was granted. However,
 4 Defendants present the Declaration of Kirk Morrison, Ashord’s University Registrar
 5 and a Vice President (Morrison Decl. ¶ 1), who attaches eight exhibits of template
 6 enrollment agreements dating back from May 18, 2007 (Morrison Decl. ¶¶ 10–17;
 7 Morrison Decl. Exs. 1–8).

8 Before comparing the arbitration provisions in those eight templates, it is
 9 important to provide context and first consider the arbitration provisions in *Rosendahl*
 10 contained in enrollment agreements signed by the named plaintiffs in January 2009 and
 11 June 2009, which stated:

12 Any disputes or controversies between the parties to this
 13 Agreement arising out of or relating to the student’s
 14 recruitment, enrollment, attendance, education, billing,
 15 financial aid, financing options, student finance agreement,
 16 disbursement of funds, excess funds and other payments or
 17 career service assistance by Ashford . . . shall be resolved by
 binding arbitration in accordance with the Commercial
 Arbitration Rules of the American Arbitration Association
 then in effect or in accordance with procedures that the
 parties agree to in the alternative.

18 Any such arbitration shall be the sole remedy for the
 19 resolution of any disputes or controversies between the
 parties to this agreement.

20 You and Ashford University may bring claims against
 21 the other only in your or its individual capacity, and not as a
 plaintiff or class member in any purported class or
 representative proceeding (including, but not limited to,
 class actions and class arbitrations).

22 Chen Decl. Exs. A & B, *Rosendahl*, No. 11-cv-61-BAS(WVG), ECF No. 25-2. The
 23 *Rosendahl* named plaintiffs appear to have signed enrollment agreements including the
 24 exact same arbitration provision. *Id.*

25 The eight template enrollment agreements attached to the Morrison Declaration
 26 all include arbitration provisions that also prohibit participation in class actions. In
 27 fact, the template used beginning in May 2007 appears to be identical to the arbitration
 28 provision in *Rosendahl*. (See Morrison Decl. ¶ 10, Ex. 1.) However, the remaining

1 seven templates used after July 2010 include a significant difference, an arbitration opt-
 2 out provision. (Morrison Decl. Exs. 2–8.)

3 The following is opt-out language contained in six of the seven post-July 2010
 4 enrollment-agreement templates: “You may reject the arbitration provisions included
 5 in this Section, but not the requirement to participate in the Grievance Procedure for
 6 Students prior to asserting a Claim against the University in any other manner, by
 7 faxing a signed rejection notice to the University Registrar . . . within fifteen (15)
 8 calendar days after you sign this Agreement.” (See Morrison Decl. Exs. 3–8.) The July
 9 2010 template’s language differs slightly from the later templates and allows up to 30
 10 days to opt out, but is otherwise the same. (See *id.* Ex. 2.) Missing from all of the
 11 templates that include the opt-out language is the language stating, “Any such
 12 arbitration shall be the sole remedy for the resolution of any disputes or controversies
 13 between the parties to this agreement[,]” contained in the *Rosendahl* enrollment
 14 agreements and the July 2010 template. (See *id.* Ex. 1.)

15 According to Defendants, “12,778 students enrolled [at Ashford] between March
 16 1 and May 18, 2007, whereas 395,206 students have enrolled since May 18, 2007.”
 17 (Morrison Decl. ¶ 3.) And according to Plaintiff, Bridgepoint had 67,744 students
 18 enrolled as of June 2010, 42,025 students as of March 2009, and 19,509 students at the
 19 end of the first quarter of 2008. (SAC ¶¶ 26–27.) Though it is not definitive that the
 20 students as of June 2010 signed a pre- or post-May 2007 enrollment agreement, it is
 21 safe to surmise that they did not sign a post-July 2010 enrollment agreement with the
 22 opt-out language. Assuming for the sake of argument that none of the students
 23 attending a Bridgepoint institution as of June 2010 signed a pre-May 2007 enrollment
 24 agreement, almost 68,000 students would be bound by arbitration provisions just as the
 25 named plaintiffs in *Rosendahl*. The number of students enrolled from March 2005 to
 26 the commencement of this action totals almost 408,000 students based on the
 27
 28

1 enrollment numbers provided by Defendants.¹¹ (*See Morrison Decl.* ¶ 3.) Using these
 2 values, at least 16% of potential class members are probably bound by arbitration
 3 provisions, thereby precluding their participation in this or any other class action. And
 4 this value could increase significantly depending on the proportion of students who did
 5 not actually opt out.

6 This uncertainty leads this Court to conclude that the proposed class as currently
 7 defined is neither precise nor presently ascertainable. *See O'Connor*, 184 F.R.D. at
 8 319. Contrary to Plaintiff's position, there is evidence supporting Defendants'
 9 contention that post-May 2007 students signed enrollment agreements with arbitration
 10 provisions. But it is not clear what proportion of the students opted out. What is
 11 problematic is that for over 300,000 students who enrolled after May 2007, and more
 12 likely for students enrolled after July 2010, the Court is left with making a
 13 determination of the merits of the individual claims—namely, whether students are
 14 bound by the arbitration provision or whether they opted out—to determine whether
 15 students may participate as members of the class in this action. *See Hanni*, 2010 WL
 16 289297, at *9.

17 Accordingly, the Court finds that based on the proposed class definition as
 18 currently constructed, Plaintiff fails to demonstrate an identifiable and ascertainable
 19 class in light of evidence suggesting that up to 96% of the proposed class may not even
 20 be eligible to participate in this class action.¹² *See Mazur*, 257 F.R.D. at 567. This

21
 22 ¹¹ The 408,000 value is the result of adding the 12,778 value of students enrolled between
 23 March 2005 and May 2007 with the 395,206 value of students enrolled after May 2007. (*See Morrison Decl.* ¶ 3.)

24 ¹² Incorporating Federal Rule of Civil Procedure 8(c)(1)'s designation of statute of limitations
 25 and "arbitration and awards" as affirmative defenses, Plaintiff cites *Cameron v. E. M. Adams & Co.*,
 26 547 F.2d 473, 477-78 (9th Cir. 1976) for the proposition that "the presence of 'individualized issues'
 27 based on a defense 'does not defeat the predominance of the common questions.'" (Pl.'s Reply
 28 3:6-16.) However, *Cameron* does not make such a broad assertion. Rather, it limits its holding
 regarding "the presence of individualized issues" to "compliance with statute of limitations."
Cameron, 547 F.2d at 478-79. Though Plaintiff's argument may have some merit, without additional
 legal authority stating otherwise, this Court construes the Ninth Circuit's holding in *Cameron*
 narrowly, limiting it to "individual issues of compliance with statute of limitations."

1 finding does not incorporate the foreseeable Rule 23(b)(3) problem involving
 2 predominance of common factual questions to determine which students opted out of
 3 the arbitration provisions.

4 5 **B. Choice of Law**

6 “A federal court sitting in diversity must look to the forum state’s choice of law
 7 rules to determine the controlling substantive law.” *Zinser*, 253 F.3d at 1187. “Under
 8 California’s choice of law rules, the class action proponent bears the initial burden to
 9 show that California has ‘significant contact or significant aggregation of contacts’ to
 10 the claims of each class member.” *Mazza v. Am. Honda Motor Co. Inc.*, 666 F.3d 581,
 11 589 (9th Cir. 2012) (quoting *Wash. Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906,
 12 921 (2001)). Once the class-action proponent makes this showing, the burden shifts
 13 to the other side to demonstrate “that foreign law, rather than California law, should
 14 apply to class claims.” *Wash. Mut. Bank*, 24 Cal. 4th at 921.

15 California law may only be used on a classwide basis if “the interests of other
 16 states are not found to outweigh California’s interest in having its law applied[.]”
 17 *Wash. Mut. Bank*, 24 Cal. 4th at 921. To determine whether the interests of other states
 18 outweigh California’s interest, the court looks to a three-step governmental interest
 19 test:

20 First, the court determines whether the relevant law of each
 21 of the potentially affected jurisdictions with regard to the
 particular issue in question is the same or different.

22 Second, if there is a difference, the court examines each
 23 jurisdiction’s interest in the application of its own law under
 the circumstances of the particular case to determine whether
 a true conflict exists.

24 Third, if the court finds that there is a true conflict, it
 25 carefully evaluates and compares the nature and strength of
 26 the interest of each jurisdiction in the application of its own
 law to determine which state’s interest would be more
 27 impaired if its policy were subordinated to the policy of the
 other state and then ultimately applies the law of the state
 28 whose interest would be more impaired if its law were not
 applied.

1 *Mazza*, 666 F.3d at 590 (quoting *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 87-88
2 (2010)).

3 Defendants argue that Plaintiff fails to carry her initial burden, relying on the
4 inadequate “mere fact” that Bridgepoint’s headquarters is in California while also
5 pointing out that Plaintiff had never been to California prior to the commencement of
6 this lawsuit. (Defs.’ Opp’n 15:10–15:16.) They alternatively argue that even if
7 Plaintiff carried her burden, California law still cannot apply because the circumstances
8 of this case fail *Mazza*’s three-step governmental-interest test. (*Id.* at 15:17–19:1.)
9 Plaintiff responds by arguing Defendants fail to: (1) show that any differences in state
10 laws are material in this case; and (2) meet their burden showing that the interests of
11 other states outweigh California’s interest. (Pl.’s Reply 4:8–5:20.)

12 13 **1. Conflict of Laws**

14 “The fact that two or more states are involved does not in itself indicate there is
15 a conflict of laws problem.” *Wash. Mut. Bank*, 24 Cal. 4th at 919-20. “A problem only
16 arises if differences in state law are material, that is, if they make a difference in this
17 litigation.” *Mazza*, 666 F.3d at 590.

18 Plaintiff contends that Defendants have “utterly failed” to show that the
19 differences in state laws are material in this case. (Pl.’s Reply 4:8–21.) Specifically,
20 citing *In re PM Wonderful LLC Marketing & Sales Practices Litigation*, No. ML 10-
21 02199 DDP (RZx), 2012 WL 4490860, at *3-4 (C.D. Cal. Sept. 28, 2012) (“*POM I*”),
22 Plaintiff dismisses references to the Declaration of Rachel Yourtz, which contains two
23 charts summarizing research regarding the differences between state laws, because the
24 research is “*not* evidence and does *not* show why these differences are *material in this*
25 *case.*” (*Id.* (emphasis in original).)

26 In *POM I*, the circumstances in which the district court rejected the defendant’s
27 reliance on a similar chart as those submitted in this case differ from the means in
28 which the charts are used in this case. The *POM I* Court noted that a chart

1 summarizing each state’s consumer-protection law’s provisions regarding elements
2 such as scienter, reliance, and timeliness, as well as remedies and defenses was
3 provided, but the defendant failed to “indicate which of these foreign laws differ from
4 California’s laws.” *POMI*, 2012 WL 4490860, at *3. This criticism of the defendant’s
5 failure is particularly evident when examining the defendant’s brief opposing the
6 plaintiff’s class-certification motion. *See* Brief in Opp’n to Class Certification at
7 12:11–14:3, *POM I*, No. 10-ml-02199 (C.D. Cal. June 25, 2012), ECF No. 92.
8 Nowhere in the defendant’s briefing does it explain that any material differences exist
9 between California’s and other states’ laws. *See id.* Rather, the chart in question is
10 merely cited in a footnote with a parenthetical explanation stating that the “chart [was]
11 prepared to assist the Court in identifying state law variations in consumer protection
12 and deceptive trade practices laws.” *Id.* at 13 n.20.

13 The district court in *Mazza*—which also involved claims brought under
14 California’s UCL, FAL, and CLRA—was also presented with a table of examples
15 demonstrating variations in state law, which was used to support extensive briefing
16 explaining the differences in state laws. *See* Brief in Opp’n to Class Certification at
17 8:6–13:8, *Mazza v. Am. Honda Motor Co., Inc.*, No. 07-cv-07857 (C.D. Cal. July 14,
18 2008), ECF Nos. 45, 45-2. However, in concluding that “at least some of the
19 differences that [the defendant] identifies are material,” the Ninth Circuit implicitly
20 suggests that charts or tables may be considered when supported with adequate
21 briefing. *See Mazza*, 666 F.3d at 591. At the very least, the Ninth Circuit does not
22 outright remove the possibility of courts considering charts detailing purported
23 differences in state consumer-protection laws. *See id.*

24 In one example presented in *Mazza*, the Ninth Circuit observed that California
25 consumer-protection laws “have no scienter requirement, whereas many other states’
26 consumer protection statutes do require scienter.” *Mazza*, 666 F.3d at 591. The court
27 identified scienter requirements for three states—Colorado, New Jersey, and
28 Pennsylvania—as examples to highlight the differences between state consumer-

1 protection laws. *See id.* Interestingly, the three state laws identified by the Ninth
 2 Circuit were not explicitly discussed by the defendant in its opposition brief in the
 3 district court; in fact, scienter is not discussed anywhere in the brief. *See* Brief in
 4 Opp’n to Class Certification at 8:6–13:8, *Mazza*, No. 07-cv-07857 (C.D. Cal. July 14,
 5 2008), ECF Nos. 45, 45-2. Rather, scienter is almost exclusively mentioned in the
 6 table included in support of the defendant’s opposition. *Id.* That fact suggests that the
 7 Ninth Circuit believed the district court was presented with adequate briefing and
 8 support to conclude that there were material differences between state consumer-
 9 protection laws. *See Mazza*, 666 F.3d at 591.

10 Between the spectrum of possibilities ranging from *POM I*’s chart-only
 11 presentation to *Mazza*’s extensive briefing coupled with a table, this case falls
 12 somewhere between the two. Upon reviewing the *POM I* chart, it is worth noting that
 13 the *POM I* chart is strikingly similar to the one included in this case. *See* Exhibit 21,
 14 *POM I*, No. 10-ml-02199 (C.D. Cal. June 25, 2012), ECF No. 92-3. But unlike *POM*
 15 *I*, Defendants’ opposition brief is not completely devoid of any explanation of the
 16 differences between California and other states’ consumer-protection laws. (*See* Defs.’
 17 Opp’n 16:5–24.) Referencing their chart, Defendants provide several, albeit brief,
 18 examples of how California’s consumer-protection laws are materially different from
 19 other states’ laws. (*Id.*) A few examples that Defendants provide include: (1)
 20 “California’s UCL, FAL, and CLRA require that a plaintiff has suffered injury as a
 21 result of defendant’s unlawful conduct, other states do not”; (2) “[s]tates’ consumer
 22 protection statutes also vary to the extent scienter is a required element and whether
 23 reliance is required”; (3) “statute of limitations vary significantly from one year to ten
 24 years”; and (4) “[s]ome states do not permit class actions under their consumer
 25 protection laws.” (*Id.*) Each example provided also cites the Yourtz Declaration and
 26 the included charts.

27 Even though Defendants provide more briefing on the material differences
 28 between state laws than the defendant in *POM I*, they do not provide the same level of

1 extensive briefing that the defendant in *Mazza* did on the same subject. In *Mazza*, the
 2 defendant explained in great detail the differences between state laws in its briefing to
 3 the district court. *See* Brief in Opp’n to Class Certification at 8:6–13:8, *Mazza*, No. 07-
 4 cv-07857 (C.D. Cal. July 14, 2008), ECF Nos. 45, 45-2. Comparatively, Defendants’
 5 explanation in its opposition brief here explaining the material differences in state
 6 consumer-protection laws is sparser. (*Cf.* Defs.’ Opp’n 16:5–24.) Nonetheless, though
 7 Defendants’ charts may not be evidence, as Plaintiff contends, they are available to this
 8 Court to consider in light of the fact that Defendants provide some explanation to guide
 9 the Court in understanding that material differences may exist in the relevant state
 10 consumer-protection laws.

11 The two charts that Defendants provide are titled “Material Differences in State
 12 Consumer Protection and Deceptive Trade Practices” (Yourtz Decl. Ex. A) and
 13 “Variations in State Intentional / Negligent Misrepresentation Laws” (Yourtz Decl. Ex.
 14 B). Both charts provide information regarding the laws of the remaining 49 states in
 15 the Union and the District of Columbia. Citing *Mazza* and the Yourtz Declaration,
 16 Defendants generally contend that “[s]tates’ consumer protection statutes also vary to
 17 the extent scienter is a required element and whether reliance is required.” (Defs.’
 18 Opp’n 16:5–24.)

19 As previously mentioned, in *Mazza*, the Ninth Circuit observed that California
 20 consumer-protection laws “have no scienter requirement, whereas many other states’
 21 consumer protection statutes do require scienter.” 666 F.3d at 591. Defendants’ chart
 22 includes two identical comparisons made in *Mazza*, Colorado and Pennsylvania,
 23 observing that Colorado’s Consumer Protection Act requires that certain violations be
 24 made “knowingly” and Pennsylvania’s Unfair Competition, Acts or Practices requires
 25 plaintiffs to show all elements of common-law fraud, including knowledge. (Yourtz
 26 Decl. Ex. A at 9, 43 (citing Colo. Rev. Stat. § 6-1-105(1)(e), (g), (u); *Debbs v. Chrysler*
 27 *Corp.*, 810 A.3d 137, 155 (Pa. Super. 2002)).) The chart also indicates that
 28 Connecticut has no scienter requirement, but Alaska, Arizona, and Arkansas do. *See*

1 *Cheshire Mortg. Serv., Inc. v. Montes*, 223 Conn. 80, 106 (1992) (“[A] party need not
 2 prove an intent to deceive to prevail under CUTPA.”); Alaska Stat. § 45.50.471(b)(12)
 3 (requiring intent); Ariz. Rev. Stat. § 44-1522(A) (requiring intent); Ark. Code § 4-88-
 4 107(a)(1) (knowingly). This sample of state laws appears accurate based on the
 5 Court’s independent verification.

6 With regard to reliance, *Mazza* observed that California “requires named class
 7 plaintiffs to demonstrate reliance, while some other states’ consumer protection statutes
 8 do not,” citing examples to laws in Florida, New Jersey, and New York. 666 F.3d at
 9 591. Indeed, states such as Connecticut, Delaware, Florida, and Montana, among
 10 others, do not require reliance. *See Izzarelli v. R.I Reynolds Tobacco Co.*, 117 F. Supp.
 11 2d 167, 176 (D. Conn. 2000); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074
 12 (Del. 1983); *Davis v. Powertel, Inc.*, 776 So. 2d 971, 973 (Fla. Ct. App. 2000); *Durbin*
 13 *v. Ross*, 916 P.2d 758, 762 (Mont. 1996).

14 Differing statutes of limitations provide another material difference between
 15 states’ consumer-protection laws. The statute of limitations for California’s consumer-
 16 protection laws range between three to four years. *See* Cal. Civ. Code § 1783 (three
 17 years); Cal. Bus. & Prof. Code § 17208 (four years); Cal. Bus. & Prof. Code § 17500
 18 (three years via Cal. Civ. Proc. Code § 338). However, statutes of limitations from
 19 other states range anywhere from one to ten years. *See* La. Rev. Stat. § 51:1409(E)
 20 (one year from date of allegedly deceptive act); Me. Rev. Stat. tit. 14, § 752 (six years
 21 from discovery of violation); R.I. Gen. Laws § 9-1-13 (ten years from time the
 22 violation took place). Given that the class period begins in March 2005, almost six
 23 years prior to the commencement of this case, the differing statutes of limitations could
 24 have a material effect on a former student’s rights to pursue certain claims against
 25 Defendants.

26 Similar material differences exist between the states’ intentional and negligent
 27 misrepresentation laws. For example, California requires knowledge of the falsity and
 28 intent to induce reliance for intentional and negligent misrepresentation. *See Bowers*

1 *v. AT & T Mobility, LLC*, 196 Cal. App. 4th 1545, 1557 (2011); *Nat'l Union Fire Ins.*
 2 *Co. of Pittsburgh, PA v. Cambridge Integrated Servs. Grp., Inc.*, 171 Cal. App. 4th 35,
 3 50 (2009). However, states such as New Jersey and Texas have no scienter
 4 requirement for negligent misrepresentation. *See Gaelick v. Conn. Gen. Life Ins. Co.*,
 5 No. 11-2464(SRC), 2011 WL 3794228, at *5 (D.N.J. Aug. 25, 2011) ("The elements
 6 of negligent misrepresentation are essentially the same as those of common law fraud
 7 except negligent misrepresentation does not require scienter."); *Angle v. Mortg. Elec.*
 8 *Registration Sys.*, No. 4:11CV352, 2011 WL 4370969, at *1 (E.D. Tex. Sept. 19, 2011)
 9 ("Unlike common law fraud, negligent misrepresentation does not require knowledge
 10 of the falsity or reckless disregard of the truth or falsity of the representation at the time
 11 it was made."). Material differences also exist between states' misrepresentation laws
 12 in their standards of proof as well as statutes of limitations. *See, e.g., Rosener v. Sears,*
 13 *Roebuck & Co.*, 110 Cal. App. 3d 740, 756 (1980) ("[F]raud need be proved by a
 14 'preponderance of the evidence' rather than 'clear and convincing evidence.'"); *Daines*
 15 *v. Vincent*, 190 P.3d 1269, 1279 (Utah 2008) ("To prevail on a claim of fraudulent
 16 inducement, [the plaintiff] must present clear and convincing evidence . . ."); *Jardine*
 17 *v. Brunswick Corp.*, 423 P.2d 659, 663 (Utah 1967) (also requiring clear and
 18 convincing evidence for negligent misrepresentation); *see also, e.g.,* 12 Vt. Stat. tit. 12,
 19 § 511 (six-year statute of limitations); Cal. Civ. Proc. Code § 338(d) (three-year statute
 20 of limitations); *Winn Fuel Serv., Inc. v. Booth*, 34 So. 3d 515, 519 (La. Ct. App. 2010)
 21 (one-year statute of limitations).

22 The Ninth Circuit pointed out that differences in scienter and reliance
 23 requirements between states' consumer-protection laws are "not trivial or wholly
 24 immaterial," explaining that "[i]n cases where a defendant acted without scienter, a
 25 scienter requirement will spell the difference between the success and failure of a
 26 claim," and "[i]n cases where a plaintiff did not rely on an alleged misrepresentation,
 27 the reliance requirement will spell the difference between the success and failure of the
 28 claim." *Mazza*, 666 F.3d at 591. The court continued that "[c]onsumer protection laws

are a creature of the state in which they are fashioned,” and “[t]hey may impose or not impose liability depending on policy choices made by state legislatures or, if legislators left a gap or ambiguity, by state supreme courts.” *Id.* This reasoning undoubtedly also applies to the consumer-protection laws—California’s UCL, FAL, and CLRA—compared in this case. The same can also be said for intentional and negligent misrepresentation laws, many of which developed through states’ common law.

Upon reviewing the relevant state laws, it is apparent to this Court that at least some material differences exist between states’ consumer-protection and misrepresentation laws.¹³ The Court would normally proceed to the test’s second step, determining whether a true conflict exists, but Plaintiff appears to concede that point. Consequently, the Court proceeds to the test’s third step.

2. Which State Interest Is Most Impaired

Plaintiff argues that Defendants fail to meet their burden of showing that the interests of other states outweigh California’s interest because California is the “place of the wrong.” (Pl.’s Reply 5:2–20.) She elaborates by explaining that all class members, herself included, “were exposed to Defendants’ misrepresentations, omissions, and high-pressure recruiting tactics *solely* via Defendants’ websites and telephone calls with [enrollment advisors][,]” with all of this conduct taking place in San Diego, where Bridgepoint is headquartered, the enrollment advisors are located, and the advertising and marketing operations are maintained. (*Id.* (emphasis in original).)

//

¹³ Relying on *POMI* and *Forcellati v. Hyland’s, Inc.*, 876 F. Supp. 2d 1155, 1161 (C.D. Cal. 2012), Plaintiff suggests that the first step of the governmental-interest test is a fact-intensive analysis. (Pl.’s Reply 4:19–21.) However, neither case requires rigorous application of the facts of the case in the conflict-of-laws step of the governmental-interest test. In fact, the Ninth Circuit in *Mazza* strictly compares requirements imposed by certain state laws without any reference to the facts of the case. *See Mazza*, 666 F.3d 590-91. As a result, the Court rejects Plaintiff’s suggested analytical framework for the conflict-of-laws step of the governmental-interest test.

1 *Mazza* recognized that “California considers the ‘place of the wrong’ to be the
 2 state where the last event necessary to make the actor liable occurred.” 666 F.3d at
 3 593-94 (citing *McCann*, 48 Cal. 4th at 94 n.12; *Zinn v. Ex-Cell-O Corp.*, 148 Cal. App.
 4 2d 56, 80 n.6 (1957)). But when the liable conduct occurred, for example, over the
 5 telephone where there are two people speaking at fixed points in two different states,
 6 it is not as clear where the “place of the wrong” is. Plaintiff suggests that the “place
 7 of the wrong” is where the speaker makes, for example, the fraudulent representations
 8 over the telephone.

9 In *Does v. Gellar*, 533 F. Supp. 2d 996, 1004 (N.D. Cal. 2008), the court faced
 10 a situation where a misrepresentation occurred over long-distance communication. The
 11 *Gellar* Court opined that “[f]ollowing common law tort principles, the court might be
 12 inclined to rule that the situs of the act is the place where a fax or email was received,
 13 not sent. But the best support for that statement is found not in any recent, binding
 14 precedent but rather in the First Restatement of Conflict of Laws, published in 1934.”
 15 *Gellar*, 533 F. Supp. 2d at 1004.

16 Like the court in *Gellar*, this Court also faces determining the place of the
 17 wrong with alleged wrongful conduct committed over long-distance communication
 18 without any recent, binding precedent. To start, the First Restatement of Conflict of
 19 Laws does indeed define the “place of wrong” as “in the state where the last event
 20 necessary to make an actor liable for an alleged tort takes place.” *See Zinn*, 148 Cal.
 21 App. 2d at 80 n.6 (citing Restatement (First) of Conflict of Laws § 377 (1934)). And
 22 Note 4 of the Restatement further elaborates that “[w]hen a person sustains loss by
 23 fraud, the place of wrong is where the loss is sustained, not where fraudulent
 24 representations are made.”¹⁴ Given that *Mazza*, *Zinn*, and to some extent *Gellar* have
 25

26 ¹⁴ Accompanying the Restatement’s Note 4 is the following illustrations: (1) “A, in state X,
 27 makes false misrepresentations by letter to B in Y as a result of which B sends certain chattels from
 28 Y to A, in X. A keeps the chattels. The place of the wrong is in state Y where B parted with the
 chattels”; and (2) “A, in state X, owns shares in the M company. B, in state Y, fraudulently persuades
 A not to sell the shares. The value of the shares falls. The place of wrong is X.”

1 accepted the Restatement’s definition for the “place of wrong,” and the Restatement
2 being the Court’s best available guidance, it is reasonable to accept the Restatement’s
3 Note 4, setting the place of wrong where the loss is sustained in fraudulent-
4 misrepresentation cases.

5 Here, Plaintiff alleges that misrepresentations and omissions to herself and other
6 class members all occurred over long-distance communications through websites and
7 telephone calls with Defendants’ enrollment advisors. (Pl.’s Reply 5:2–14.) But
8 applying the Restatement’s principle articulated in Note 4, it is not where the
9 communications originate—in this case, San Diego, California—but rather where
10 Plaintiff or other potential class members sustained their loss—which is likely the state
11 where the former students are domiciled at the time they signed up for enrollment.
12 Focusing on Plaintiff’s circumstances, the place of wrong would be in Indiana, from
13 where Plaintiff presumably communicated with Defendants.

14 More importantly, there is evidence before this Court that almost 90% of
15 potential class members resided outside of California when they enrolled. (Morrison
16 Decl. ¶ 4.) This fact is important because “courts should not attempt to apply the laws
17 of one state to behaviors that occurred in other jurisdictions.” *See Mazza*, 666 F.3d at
18 593 (internal quotation marks omitted). With almost 90% of potential class members
19 having enrolled outside of California, imposing California law on those members
20 would undoubtedly impair the foreign states’ interests. *See id.* California law also
21 recognizes as much given that it emphasizes that “the place of the wrong has the
22 predominant interest.” *See Hernandez v. Burger*, 102 Cal. App. 3d 795, 802 (1980).
23 And here, not to belabor the point, but almost 90% of the wrongs alleged occurred
24 outside of California. *See id.*

25 Following the analytic framework emphasized in *Mazza*, this Court concludes
26 that each potential class member’s consumer-protection and misrepresentation claims
27 should be governed by the laws of the jurisdiction in which the loss was sustained. *See*
28 *Zinn*, 148 Cal. App. 2d at 80 n.6; *see also* Restatement (First) of Conflict of Laws §

1 377 (1934). Under the facts and circumstances of this case, applying California law
2 for a potential nationwide class is inappropriate. *See Wash. Mut. Bank*, 24 Cal. 4th at
3 921.

4
5 **IV. CONCLUSION & ORDER**

6 It should be emphasized that this order does not make any determination
7 regarding the merits of potential individual claims by Plaintiff or any other former
8 student, or even the possibility of pursuing a class action on a smaller scale against
9 Defendants. The student complaints attached to Plaintiff's class-certification motion
10 describe a poorly run educational institution eliciting much doubt as to whether
11 Defendants do indeed prioritize their students' best interests. The vast sums of money
12 produced from students is particularly alarming given the circumstances described.

13 But ultimately, Plaintiff fails to satisfy ascertainability requirements for the
14 proposed class as currently constructed and Defendants successfully carry their burden
15 to demonstrate that this action is not appropriate for nationwide class treatment under
16 California law under Rule 23.

17 In light of the foregoing, the Court **GRANTS** Defendants' motion for sanctions
18 and strikes the Ferguson Declaration. The Court also **DENIES** Plaintiff's motion for
19 class certification.

20 **IT IS SO ORDERED.**

21
22 **DATED: March 26, 2015**

23 

24 **Hon. Cynthia Bashant**
25 **United States District Judge**
26
27
28